In The

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Supreme Court of the United States

October Term, 1974

No. 74-865

THEODORE KOSS and KOSS SECURITIES CORPORATION,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Petitioner respectfully prays that a writ of certiorari issue to the United States Court of Appeals for the Second Circuit, to review the judgment of that Court dated November 15, 1974, which affirmed a judgment of the United States District Court for the Southern District of New York, dated June 14, 1974, which convicted both petitioners of conspiracy to violate the securities laws and mail fraud, and of seven substantive offenses, including violations of the securities laws and mail fraud; 15 U.S.C. Sections 77q; 77x; 78j(b); 78ff; 78o(c)(2); Rule 17, C.F.R. 240-10b5; 18 U.S.C. Sections 2; 371; 1341. Theodore Koss was also convicted of submitting a false writing to a federal officer, 18 U.S.C. Section 1001.

OPINIONS BELOW

The only opinion in the case was written by the United States Court of Appeals for the Second Circuit on November 15, 1974, affirming the judgment of the United States District Court for the Southern District of New York convicting the petitioners of the above listed offenses. The opinion of the Court of Appeals is printed in Appendix A, *infra*, pages 3a to 23a. The Court of Appeals denied a petition for rehearing by order dated December 18, 1974, which is printed in Appendix B (24a).

No opinion was written by the District Court when it adjudged the petitioners guilty of the above listed offenses. Previously, on June 7, 1974, the District Court, without opinion, denied petitioners' motion for a new trial.

JURISDICTION

The order of the United States Court of Appeals for the Second Circuit was made on November 15, 1974 and appears herein at Appendix A (1a).

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

1. Were the petitioners prejudiced by evidence that they participated in a different conspiracy from the one charged in the indictment, and by the failure to give a cautionary charge to the jury, differentiating the evidence concerning the petitioners from the other evidence in the case?

2. Should the indictment have been dismissed for entrapment, as a matter of law, because Government informants formulated and carried out the conspiracy charged in the indictment, instead of limiting themselves to giving the petitioners an opportunity to commit crimes, without themselves committing such crimes?

3. Was there sufficient evidence to convict the petitioners of failure to deposit in escrow money received upon a contingent public offering of securities, in which the money paid for subscriptions would be refunded if all the subscriptions were not sold, upon evidence that the petitioners deposited $3,000 in escrow, and that they received $2,600 in subscriptions?

4. Was the evidence of differences in entries in petitioners' records of the same transactions, concerning dates, number of shares, and prices of shares, without evidence that petitioners wilfully gave such records to federal officials, knowing them to be false, sufficient to support their conviction of giving false writings to federal officials?

5. Were the petitioners surprised and prejudiced by insufficient pre-trial disclosure of documents and transaction which were not disclosed by the indictment, or by the bills of particulars?

STATEMENT OF THE CASE

On September 25, 1973, Theodore Koss and Koss Securities Corporation, ("Koss"), among others, were indicted for conspiracy to violate the securities laws, and conspiracy to commit mail fraud (Count 1); fraud in the offer and sale of securities (Count 2); fraud in the purchase and sale of securities (Count 3); failure to deposit in escrow money received as subscriptions to an all or nothing public offering of securities (Count 4); mail fraud (Counts 5; 8; 11); and giving false writings to the Securities and Exchange Commission (Count 13) (A4-14).

Michael Hellerman, named as an unindicted co-conspirator, testified that in December, 1970, he talked to unindicted co-conspirators Murray Taylor and Murray Levine about his taking over and completing an underwriting by Koss Securities Corporation of 65,000 shares of Automated Information Systems, ("Automated"), of which Koss was only able to sell 15,000 shares (A18-19).

Murray Levine was then a registered securities representative employed by Koss, who resigned such employment in January, 1971 (T900).

Hellerman said to Levine and Taylor (A19):

> ". . . that I would do the underwriting in Automated Information Systems and I would buy the whole 65,000 shares of stock at $1 a share, which was the offering price that it was being sold to the public for, and Mr. Levine said that Mr. Koss had already sold approximately

> 15,000 shares of stock, he didn't know the specific amount, but around 15,000 shares, he would have to speak to Mr. Koss to find out if we could finalize the deal."

Hellerman also said to Levine at this first meeting (A19-20):

> "I explained to Mr. Levine that the only way I would do the underwriting or sell the 65,000 shares of stock was if I could sell all the stock . . . .
>
> * * *
>
> I also told Mr. Levine that in order to place this stock or do the underwriting for Automated Information or for Koss Securities that I want half the proceeds of the offering. In other words, if it was 65,000 shares of stock, then I want half the money, $32,500 in cash back to myself as my fee for underwriting the stock.
>
> . . .I wanted to know if Mr. Koss would give up his stock that he sold and, if he didn't give up the stock that he sold, that I wouldn't do the deal."

Shortly after February 13, 1971, Hellerman again talked to Taylor and Levine. At that time, Hellerman said that Levine showed an amended offering circular which added the name of Interstate Equities Corporation ("Interstate") as a co-underwriter with Koss of such 65,000 shares of Automated

(A23). Interstate was a new security brokerage firm formed by Stephen Zardus, a co-defendant who pleaded guilty and testified for the Government in this case.

Hellerman hired Zardus' firm, Interstate to serve as co-underwriter of subscriptions to 50,000 unsold shares of Automated for compensation reduced from 10 cents per share commission, plus 5 cents per share expenses, aggregating $7,500, to $1,500 (A89).

In addition, Interstate also served as Hellerman's broker buying Automated shares in the over-the-counter market after the subscription period expired on March 2, 1971, and selling such shares in the same market, for which Hellerman paid to Interstate the prevailing commissions for over-the-counter transactions (A87-90).

Interstate sold 4,400 shares to six of Zardus' personal customers (A27; T534), leaving 45,600 shares for the Hellerman conspirators to sell (A27; T536).

The Hellerman conspirators sold about 17,000 shares to actual persons, leaving unsold about 28,000 shares, which Hellerman disposed of as follows (A28):

> "So I told Mr. Taylor to go to a telephone book and just take the names out and the addresses out and that is the list that I gave to Mr. Zardus to sell that 28,000 shares to."

Between February 15-18, 1971, Hellerman, Taylor, and Levine, talked to Robert Santis, the president of Automated

(A29). Hellerman asked Santis for one-half of the proceeds of the underwriting as his fee, to which Santis replied that this was too much (A29). Hellerman said (A30):

> ". . . I said I was concerned, very much concerned, with Teddy Koss having 15,000 shares; that if Teddy Koss didn't live up to his agreement and sell me the 15,000 shares at $1.50 that I wouldn't have the box in the stock and I wouldn't be able to sell them or wouldn't be able to raise additional funds at a later date.
>
> Mr. Santis said I shouldn't worry about Mr. Koss; that although I had never met Mr. Koss at this point, he had given his word to Murray Levine, the stock broker, and Mr. Santis said he would make sure that Mr. Koss lived up to his word of selling me the 15,000 shares at $1.50."

Hellerman also said that his partners in the conspiracy were (A31):

> "When I had our conversations I was going to give Murray Taylor, after paying off Murray Levine, the stock broker, for the work he was going to do, and after paying off Stephen Zardus for the work he was going to do and paying off the traders and the stock, Mr. Layne was going to get 25 per cent of the deal, and Mr. Taylor was going to get 25 per cent of the deal, and I was going to get 50 per cent of the deal."

Murray Levine testified that Hellerman promised him "10 per cent of the profits" (T927).

Hellerman described his method of operation in selling Automated shares to the public, as follows (A25-26):

> "Well, because of my first agreement with the government (to act as an informant without committing any crimes) I introduced customers that were going to buy the stock to Murray Taylor and I tried to blame the deal — I tried to make believe it was Murray Taylor's deal, not mine, so if anything happened with the deal, I wouldn't get blamed for it. . . . I would say, 'If you buy a thousand shares of stock at a dollar, we will guarantee your thousand dollars, that you can't lose your thousand dollars, but we want 50 per cent of the profits of the stock when it is sold at 5 or 8 or 10' and with many of the legitimate people that were put into the offering, that is the kind of deal we made with them."

In addition to selling shares themselves, Hellerman and Taylor also obtained the following stock salesmen, to whom they paid commission on each share they sold, to sell Automated shares for them: Herbert Shulman, a co-defendant given a separate trial (T207); Steve Adlman, a co-defendant who pleaded guilty and testified herein for the Government (T208); and Robert Kolbert, a co-defendant who pleaded guilty and testified herein for the Government (T209). Kolbert allegedly recruited co-defendants William McGee, who was convicted

along with petitioners, and Steve Hagler, a co-defendant who was acquitted (T721; T729).

Hellerman testified that he met Koss for the first time in Miami about April 11, 1971, where they talked as follows (A49-51):

> "So I said, 'What do you want to do?' He said, '...I want 5,000 shares of the stock for myself personally.'
>
> So I said, 'You mean you want to take it from your customers, at whatever you take it from them is your business. You want to keep the 5,000 shares? He said, 'Yes.'
>
> I said, 'When are you going to get out of the stock? Are you going to back-door me when the stock is the highest?' He said, 'No.' . . .He says, 'No, he'll sell the stock when I sell — as I sell out my position, he'll sell out proportionately, and he will listen to everything I tell him to do and he won't do any back-dooring and to let him have 5,000 shares of the stock because he wants to make some money.' . . .I said, 'All right. Are you going to sell me the balance of the stock as per the agreement with Murray Levine and sell me the balance?' He says, 'Yes.' We figured out there was a balance of 8,800 shares after the 1,200 and he said, yes, he would sell me that stock at $1.50."

Between March 16, 1971 and April 16, 1971, Koss' customers, through Koss as their broker, sold 1,900 shares of Automated to brokers other than Interstate (Government Exhibits 2(a); 2(b); 2(c); 2(e); 2(z).

Between April 7, 1971 and April 14, 1971, Koss' customers, through Koss as their broker, sold 4,000 Automated shares to Interstate. On April 7, 1971, Koss, as principal, sold 1,000 Automated shares to Interstate (Government Exhibits 2(h); 2(i); 2(j); 2(r); 2(q); 2(s); 2(u); 2(x); 2(k).

Between March 23, 1971 and April 20, 1971, Koss bought from his customers 4,000 Automated shares (Government Exhibits 2(d); 2(f); 2(l); 2(m); 2(n); 2(t); 2(v); 2(w); 2(y); 2(bb).

Between March 16, 1971 and June 24, 1971, the price of Automated shares in the over-the-counter market increased from $1 to about $5.25 per share, and then fell sharply to about 25 cents per share, beginning June 25, 1971 (Government Exhibit 14).

After June 25, 1971, Koss bought 4,300 shares of Automated which it was unable to re-sell, thereby incurring a loss of $1,205 on all its transactions in Automated (Government Exhibit 77).

In May, 1971, Koss guaranteed several signatures endorsed on the back of stock certificates of Automated. Such stock certificates were issued by Hellerman, through Interstate, in names taken from telephone directories. Such signatures on the back of such stock certificates were forged by Hellerman,

Taylor, Erwin Layne, a co-defendant who was convicted along with the petitioners, and other associates of Hellerman. Hellerman testified he paid Koss $500 for such guarantees of such signatures (A62-64).

Also in May, 1971, three checks issued to stockholders whose names were taken from telephone directories, were cashed at the Chase Manhattan Bank branch at which Koss had an account, and such checks had written on their back "Koss Securities Corporation" in an unidentified handwriting. Hellerman testified he paid Koss 1% of such checks for such cashing of such checks (T199-204).

LEGAL PROCEEDINGS IN THE COURTS BELOW

The indictment was filed on September 25, 1973, naming sixteen defendants and six co-conspirators. On October 9, 1973, Koss pleaded not guilty and was released on personal recognizance.

On October 18, 1973, Koss made a motion for a bill of particulars, for discovery, and to dismiss the indictment. Such motions were denied by an order dated February 25, 1974, except that the Government consented to furnish certain particulars.

Motions by several defendants, including Koss, for severance, were denied, except that a motion by Koss and other defendants for severance of Counts 12 and 13 were granted by an order dated March 12, 1974, but an order dated March 29, 1974, reconsidered such prior order and denied severance of Count 13.

The case was tried before the Court (Metzner, J.) and a jury, for thirteen trial days between April 17, 1974 and May 10, 1974, on which date the jury found Theodore Koss guilty of conspiracy and seven substantive offenses, listed at the beginning of this petition; and the jury also found Koss Securities Corporation guilty of the same offenses, except giving false writings to the S.E.C., 18 U.S.C. Section 1001.

On June 7, 1974, Koss made a motion for a new trial which was denied.

On June 14, 1974, judgment of conviction was made. Theodore Koss was sentenced to imprisonment for 1 year on Count 1, with sentence suspended on the remaining counts; and he was placed on probation for three years. Koss Securities Corporation was sentenced to pay a fine of $1,500 on Count 1, with sentence suspended on the remaining counts. Bail was continued pending appeal.

Upon appeal, the Court of Appeals for the Second Circuit affirmed such convictions on November 15, 1974; and it denied a petition for rehearing by order dated December 18, 1974.

REASONS FOR GRANTING THE WRIT

1. a. Hellerman testified that he formed and took charge of carrying out a conspiracy to:

> ". . . do the underwriting in Automated . . . I would buy the whole 65,000 shares of stock at $1 a share, which was the offering price" (A19);
>
> "that I want half the proceeds of the offering . . . I want half the money, $32,500 in cash back to myself as my fee for underwriting the stock" (A20).

Hellerman told his co-conspirator, Murray Taylor (A28):

> ". . . to go to a telephone book and just take the names out and the addresses out and that is the list that I gave to Mr. Zardus to sell that 28,000 shares to."

Hellerman's mode of operation was to raise the price of Automated shares "by manipulation and the misleading statements and any way you can to force it higher" (A48), through "wash" buys and sales in the over-the-counter market.

In addition to themselves selling shares of Automated at such fraudulently inflated prices, Hellerman and Taylor also bribed several salesmen employed by securities firms, to whom they paid up to $1 per share as "commissions" for selling Automated shares to their customers (T207-209; T721; T729).

There was no evidence that Koss agreed to do, or did any of the aforesaid acts.

Instead, Hellerman testified that about April 11, 1971, in Miami, he had a conversation with Koss in which Koss agreed (A50):

> "'. . .he'll sell the stock when I sell — as I sell out my position, he'll sell out proportionately and he will listen to everything I tell him to do and he won't do any back-dooring and to let him have 5000 shares of the stock because he wants to make some money. He wants, he says he knows it's going to be a big thing and he can use the money and he wants it.'
>
> I said, 'All right. . . . '"

In addition, Hellerman testified he paid $500 to Koss to guarantee signatures endorsed on the back of stock certificates which Hellerman, through Zardus, caused to be issued to names taken from telephone directories (A63). Hellerman, Taylor, and their associates forged such signatures (A63-65).

Hellerman testified he also paid Koss 1% of the face amount of three checks payable to stockholders whose names were taken from telephone directories, for helping Hellerman to cash those checks at the Chase Manhattan Bank branch at which Koss had an account; and that "Koss Securities Corporation" was written on the backs of those checks in a handwriting which was not identified (T199-204).

Thus, the evidence showed an agreement among Michael Hellerman, Murray Taylor and Erwin Layne to raise the price of Automated shares by fraud, and to sell such shares at such fraudulently inflated prices; and it also showed three different agreements between Hellerman and Koss that Koss shall sell 8,800 Automated shares to Hellerman; another agreement that Koss shall guarantee signatures endorsed on Automated's stock certificates; and a third agreement that Koss shall assist Hellerman in cashing three checks payable to stockholders whose names were taken from telephone books.

The evidence of Koss' aforesaid actions was legally insufficient to establish that by such actions Koss became a participant in the conspiracy to which Hellerman testified, to raise the price of Automated shares by fraud, and to sell such shares at such fraudulently inflated prices.

The evidence of Koss' aforesaid actions showed, at most, that Koss gave collateral co-operation to the Hellerman conspiracy, without becoming a participant therein.

In *Kotteakos v. United States*, 328 U.S. 750, 754 (1945), the Court quoted with approval the statement of the Court of Appeals in that case that:

> "Thieves who dispose of their loot to a single receiver — a single 'fence' — do not by that fact alone become confederates: they may, but it takes more than knowledge that he is a 'fence' to make them such."

Hellerman testified that he formulated the conspiracy charged in the indictment, and that he took charge of carrying it out (A23-26); and that as the leader of the conspiracy, he was going to take 50% of its profits for himself, and give 25% thereof each to his partners in the conspiracy, the co-conspirator Murray Taylor, and the co-defendant Erwin Layne (A31). In addition, Murray Levine testified that Hellerman promised him 10% of the profits (T927).

Thus, Koss had no "stake in the outcome" of the conspiracy according to Hellerman, its leader. *United States v. Falcone*, 311 U.S. 205 (1940).

The opinion of the Court of Appeals stated that Koss' underwriting commissions of $1,500, plus $750 expenses, were his stake in the outcome of the Hellerman-Taylor-Layne conspiracy (Appendix A, 13a).

But payment of underwriting commission and expenses to Koss was not one of the objects of the conspiracy, whereby Hellerman-Taylor-Layne sought to obtain money for themselves by selling shares of Automated at fraudulently inflated prices.

The opinion of the Court of Appeals also stated (Appendix A, 13a):

> "Koss acted in furtherance of the conspiracy during the offering by violating his duty as an underwriter to disclose material information through an amended offering circular."

We submit that non-disclosure in a security offering circular of information about the Hellerman conspiracy, is not legally sufficient to make Koss a participant in that conspiracy without other evidence that Koss agreed to participate and did participate in such conspiracy.

In *Direct Sales Company v. United States*, 319 U.S. 703, 709 (1943), the *Falcone* case, *supra*, (311 U.S. 205), was said to have decided:

> ". . . that one does not become a party to a conspiracy by aiding and abetting it, through sales of supplies or otherwise, unless he knows of the conspiracy; and the inference of such knowledge cannot be drawn merely from knowledge the buyer will use the goods illegally."

In this case, there was no evidence that Koss had knowledge of the Hellerman conspiracy at any time up to March 2, 1971, when the 90 days security underwriting period expired. Instead, Robert Santis, the president of Automated, testified that Koss had no knowledge about Hellerman until about March 10, 1971, when Santis told Koss "that Hellerman was involved" (A106), without, however, saying in what way Hellerman was "involved", nor that Hellerman had formed a conspiracy to raise the price of shares of Automated by fraud, and to sell such shares at such fraudulently inflated prices.

The opinion of the Court of Appeals also stated (Appendix A, 13a):

> "Thereafter he was in fact successful in increasing his share of the profits of the manipulation by threatening to sell the 15,000 shares on the open market rather than putting them under Hellerman's control."

While Hellerman testified that he agreed to Koss' demand for a higher price for his Automated shares because Koss threatened to sell his Automated shares on the open market if Hellerman did not pay him more than the $1.50 agreed price therefor, such testimony was refuted by documentary evidence that Hellerman actually paid Koss less than the purported $1.50 agreed price for 5,000 Automated shares, and that Koss sustained a loss of $1,205, instead of a profit on his transactions in Automated shares (Government Exhibits 14; 76; 77).

The opinion of the Court of Appeals also stated (Appendix A, 13a):

> "Thereafter, he helped Hellerman gain control over the 15,000 shares he had sold, going so far as to buy AIS from his own customers at below the market price. He also bought shares for his firm, at the same time he was recommending sales to his customers."

The undisputed documentary evidence showed that Koss' customers only sold 9,900 of their 15,000 Automated shares, of which they only sold 4,000 to Interstate, which Hellerman controlled; and Koss sold another 1,000 Automated to Interstate out of his house trading account, leaving 4,900 Automated

shares sold to brokers other than Interstate. This shows that Koss obstructed instead of helping Hellerman gain control of Automated, and thus refutes Hellerman's oral testimony that on April 11, 1971, in Miami, Koss agreed to "listen to everything I tell him to do", and to sell all but 5,000 of his Automated shares to Hellerman (A50).

b. Moreover, Koss' actions in selling 5,000 Automated shares to Hellerman's broker, Interstate Equities; his guaranteeing of signatures endorsed on stock certificates issued to names taken from telephone books, and his acceptance of $500 for such guarantees; and the cashing in the Chase Manhattan Bank branch in which Koss had an account of three checks payable to names taken from telephone directories, and the writing of "Koss Securities Corporation" on the backs of such checks in an unidentified handwriting, and Koss' acceptance from Hellerman of 1% of the face amount of such checks, were not sufficient to constitute participation by Koss in the Hellerman-Taylor-Layne conspiracy to raise the price of Automated shares by fraud, and to sell such shares at such fraudulently inflated prices.

In *United States v. Calamaro*, 354 U.S. 351, 355 (1956), it was held that a numbers operator's employee who was paid $40 weekly for picking up and carrying to a "banker", records of lottery numbers written by a "writer", was not subject to the $50 annual wagering tax imposed upon a "person who is engaged in the business of accepting wagers". The Court said that "it is the writer and not the pick-up man who is 'engaged in receiving wagers' within the meaning of §3290." See, also: *Ingram v. United States*, 360 U.S. 672, 678 (1959).

Here, it was Hellerman-Taylor-Layne, and not the petitioners who conspired to and did raise the price of Automated shares by fraud, and sold such shares at such fraudulently inflated prices.

c. The evidence that Koss performed actions which were different from those performed by the Hellerman-Taylor-Layne conspirators, made it necessary to give the jury instructions to differentiate between Koss' actions and the actions of other defendants and co-conspirators named in the indictment; and for this purpose the evidence should have been marshalled by pointing out and explaining the differences between the evidence about Koss and the evidence about the other defendants and co-conspirators. This was not done.

In *Blumenthal v. United States*, 332 U.S. 539, 559 (1947), the Court said that in mass conspiracy trials (like this one, which started out with sixteen defendants and six co-conspirators), it was necessary that "safeguards be made as impregnable as possible", against the "risk of transference of guilt" from one defendant to another in the minds of the jury.

In *Kotteakos v. United States, supra*, 328 U.S. 750, 769-770 (1945), the Court said:

> "... in cases where related but separate conspiracies are tried together under §557 of the Code ... that the jury should take care to consider the evidence relating to each conspiracy separately from that relating to each other conspiracy charged."

No such charge was given in this case. See, also: *United States v. Kelly*, 349 F.2d 720, 757 (C.A.2, 1965).

2. Beginning before the time when they formulated and carried out the conspiracy to raise the price of Automated shares by fraud, and to sell such shares at such fraudulently inflated prices, and continuing until the end of the Automated conspiracy, Hellerman and Taylor were both Government informants (A72; T227; A85-86; T311-312), and they both informed the Government of the Automated conspiracy.

The opinion of the Court of Appeals (Appendix A, 16a), noted that Hellerman testified for the Government in six securities fraud prosecutions; and that he agreed with the Government to plead guilty to one count of fraud in another security fraud case, and "to give information to the government."

The actions of these Government informants in themselves committing the crimes charged in the indictment requires dismissal of the indictment, as a matter of law, without submitting to the jury an issue whether the petitioners had a disposition to commit the crimes charged in the indictment, or whether these Government informants overcame petitioners' scruples and induced them to do the things shown by the evidence.

In *Sherman v. United States*, 356 U.S. 369, 383 (1957), a concurring opinion by Mr. Justice Frankfurter, in which Justices Douglas, Harlan and Brennan concurred, stated:

> "No matter what the defendant's past record and present inclinations to criminality, or the depths to which he has sunk in the estimation of society, certain police conduct to ensnare him into further crime is not to be tolerated by an advanced society."

In this case, there was no evidence that Koss had inclinations to criminality. He had never been convicted of a crime. He had a clean record as a business man, and a family man, and he was active in his church. A local business man, and the minister of his church testified to his good reputation in the community (T1695-1696; T1858-1859).

Moreover, the fact that after he found himself unable to sell more than 15,000 shares, Koss, as the original underwriter, did not himself formulate and carry out a conspiracy to complete the underwriting by selling the remaining 50,000 shares to names taken from telephone directories, and by raising the price of the shares by frauds, and then selling such shares at such fraudulently inflated prices, shows that he had no predisposition to commit these crimes.

Consequently, even if the evidence that Koss sold some Automated shares to the Hellerman conspirators, that he guaranteed some signatures on endorsements of Automated stock certificates, and that three checks given in payment for Automated shares were cashed at the bank at which Koss had an account should be deemed to show that he aided Hellerman, such actions nevertheless would not be legally sufficient for submission to a jury of a prima facie case, beyond a reasonable

doubt, that Koss had a pre-disposition to commit the crimes charged in the indictment. Therefore, the indictment should have been dismissed for entrapment, as a matter of law, without submitting this issue to the jury.

It is immaterial that the Assistant United States Attorney told Hellerman (A86):

> " . . . that I could watch the deal and not to do anything wrong in the deal, not participate, just watch it . . . . "

Hellerman's non-compliance with these Government instructions did not relieve the Government of entrapment responsibility for Hellerman's criminal actions in formulating and taking charge of carrying out the conspiracy charged in the indictment. In the *Sherman* case, *supra*, the Court said that the Government cannot disown the actions of its informant by claiming he acted contrary to the Government's instructions.

United States v. Russell, 411 U.S. 423 (1973) did not decide that the principles enunciated in the *Sherman* case no longer barred prosecutions when Government informants themselves committed the crimes charged. The opinion in the *Russell* case limited to narcotic offenses the participation of Government agents or informants in the crimes charged, principally the buying of narcotics to obtain evidence against persons who made it a business to sell narcotics. The legal effect of commission by Government agents or informants of non-drug related crimes upon prosecution of other persons participating with them in such crimes remains to be decided; and this is an appropriate case for decision of that question.

3. The evidence in the record shows that between December 16, 1970 and March 2, 1971, when the stock subscription period expired, Koss received payments for subscriptions to Automated shares aggregating $2,600 (Government Exhibits 30A, T689; 30B, T689; 33, T759; 35, T761; 36, T515; 57A, 57B, 59, T1269; 61A, T1181; 63, T1077).

The record also shows that on December 30, 1970, Koss deposited $3,000 in an escrow account, available for refund of money if the all or nothing subscription to Automated shares was not entirely sold (Government Exhibits 22, 23; T460).

The above documentary evidence shows that Koss had on deposit more money than the payments he received for subscriptions up to the expiration of the subscription period, thus complying with the escrow requirements of S.E.C. Rule 15c2-4.

Yet, the Court of Appeals affirmed Koss' conviction of Count 4 of the indictment, and sustained the Government's argument that Koss received $900 of such $2,600 in January, 1971; that he did not deposit such $900 in the escrow account; that it should be inferred as a fact that the $3,000 which Koss deposited in escrow on December 30, 1970 represented payments for share subscriptions he received before that date; and that, consequently, Koss violated the cited S.E.C. Rule by his non-deposit in escrow of the $900 which he received in January, 1971.

We submit that Koss should not be convicted of this count on a mere guess or surmise that the $3,000 which Koss deposited

in escrow on December 30, 1970, consisted of money he received before that date in payments for share subscriptions, when there is no such evidence in the record.

4. The Government presented in evidence Koss' records of transactions in Automated shares, some of which he gave to the S.E.C. in 1971, and others he gave to the United States Attorney in January, 1974, four months after he was indicted. The Government pointed to differences in entries in such records relating to the same transactions, concerning dates, number of shares, and prices of shares; and it argued that such differences established that Koss violated 18 U.S.C. Section 1001, by wilfully and knowingly giving false writings to federal officials.

We submit that evidence of differences in two Koss records about the same transaction were legally insufficient to establish that Koss violated the cited statute by wilfully and knowingly giving false writings to federal officials.

Such differences in entries in two Koss records about the same transactions were merely clerical errors in keeping records and making entries therein.

Koss had no motive to conceal or to falsify his records about his firm's transactions in Automated shares. He had nothing to gain by falsifying such entries. Such differences in entries in Koss' records did not have the effect of falsifying or concealing any material fact, because Koss voluntarily gave to the S.E.C. in 1971, all the records it requested, which contained such differences in entries; and in 1974, four months after he was indicted. Koss gave to the United States Attorney his remaining

records about his firm's transactions in Automated shares, pursuant to subpoena duces tecum, thereby again disclosing such differences in entries in his records. Such disclosures negated and refuted the charge that he knowingly and wilfully falsified his records, because if he had known that his records contained different entries about the same transactions, he would have corrected his records to conform to the facts, if he had nothing to conceal, or to conform to the falsification, if he had something to conceal.

This is not a case like *Nye & Nissen v. United States,* 336 U.S. 619 (1949) where it was held that knowledge of the falsity of writings given to federal officials may be inferred from circumstantial evidence. In this case, the circumstantial evidence does not support an inference that Koss knew that his records contained different entries about the same transactions, particularly since Koss had no need or motive to falsify his records about his firm's transactions in Automated shares.

It has been held that knowledge of falsity is a material element of the crime. *United States v. Uram,* 148 F.2d 187 (C.A. 2, 1945); and where it was not shown that the defendant had knowledge of the falsity of records given to federal officials, his conviction was reversed and the indictment dismissed. *United States v. Glantzman,* 447 F.2d 199 (C.A. 3, 1971).

5. The Sixth Amendment to the Constitution of the United States gave Koss a constitutional right to be informed of the crimes with which he was charged.

The indictment, and the bills of particulars, did not inform Koss that he would be charged with selling between 8,800 and 10,000 Automated shares to Hellerman; guaranteeing signatures endorsed on Automated stock certificates, knowing that such stock certificates were issued to names taken from telephone directories and that such endorsements were forged, and accepting $500 therefor; and cashing for Hellerman at Koss' bank, three checks knowing that they were issued to names taken from telephone directories, and that their endorsements were forged, and accepting 1% of such checks as compensation therefor.

In opposing Koss' motion for a bill of particulars the Government told the District Court that sufficiently in advance of the trial it would give the defendants copies of exhibits which it intended to present in evidence, but it did not do so.

The trial went very fast, and it lasted thirteen days. Many Government exhibits were shown to counsel for only a fleeting moment before they were taken back by Government counsel, so that Koss' lawyer had no opportunity to inform himself of the text or subject matter of such exhibits, or even of the exhibit numbers.

In these circumstances, the failure to give Koss information about the aforesaid matters in advance of the trial, and the failure to give Koss the promised copies of Government exhibits in advance of the trial, made Koss unprepared to defend himself at the trial, and thereby violated his constitutional right to be informed of the criminal charges against him.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

s/ Morris Weissberg
Attorney for Petitioners

APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS DATED NOVEMBER 15, 1974

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the fifteenth day of November one thousand nine hundred and seventy-four.

Present:

HON. J. EDWARD LUMBARD

HON. WILFRED FEINBERG

HON. JAMES L. OAKES

Circuit Judges,

74-1878
74-1920
74-1879

United States of America,

Plaintiff-Appellee

v.

Appendix A — Order

Theodore Koss, Koss Securities Corporation, Stephen Zardus, Robert Santis, Herbert Schulman, Steven Adlman, Robert Kolbert, Stanley Schwartz, Samuel Weisman, Harold Lassoff, Martin Roth, Erwin Layne, Irwin Hyman, William McGee, Stephen Hagler, Dan Anfang,

Defendants,

Theodore Koss, Koss Securities Corporation, Erwin Layne, William McGee,

Defendants-Appellants.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgments of said District Court be and they hereby are affirmed.

A. DANIEL FUSARO,
Clerk

By Vincent A. Carlin
Chief Deputy Clerk

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 153, 234, 480—September Term, 1974.

(Argued September 25, 1974 Decided November 15, 1974.)

Docket Nos. 74-1878-79, 74-1920

UNITED STATES OF AMERICA,

Appellee,

—against—

THEODORE KOSS, KOSS SECURITIES CORPORATION, ERWIN LAYNE and WILLIAM MCGEE,

Defendants-Appellants.

Before:

LUMBARD, FEINBERG, and OAKES,

Circuit Judges.

Appeals from judgments of conviction entered in the Southern District of New York after jury trial before Charles M. Metzner, *J.*, finding all appellants guilty of conspiracy, mail fraud, and fraud in the purchase and sale of securities, finding appellants Koss and Koss Securities Corporation guilty of fraud in the offer and sale of securities and of failing to deposit proceeds of an "all or none" offering promptly in an escrow account, and finding appellant

Koss guilty of submitting false documents to the Securities and Exchange Commission.

Affirmed.

RICHARD WILE, Assistant United States Attorney, New York, N.Y. (Paul J. Curran, United States Attorney, and John D. Gordan III, Assistant United States Attorney, Southern District of New York, on the brief), *for Appellee.*

H. GEORGE TURCHIN, Esq., New York, N.Y. (Morris Weissberg, Esq., New York, N.Y., on the brief), *for Appellants Theodore Koss and Koss Securities.*

LAWRENCE STERN, Esq., New York, N.Y. (Edward S. Panzer, Esq., New York, N.Y., on the brief), *for Appellant Erwin Layne.*

LUMBARD, *Circuit Judge:*

Theodore Koss, Koss Securities Corporation, Erwin Layne, and William McGee appeal from judgments of conviction for mail fraud and other offenses related to the sale of stock in Automated Information Systems, Inc. (AIS) entered on June 14, 1974, in the Southern District, following a thirteen-day trial before Judge Charles M. Metzner and a jury. Each appellant was convicted of conspiring to violate the federal securities and mail fraud laws, 18 U.S.C. § 371, and of committing fraud in the purchase and sale of securities, 15 U.S.C. §§ 78j(b), 78ff, and mail fraud, 18 U.S.C. §§ 1341-42. In addition, Koss and Koss Securities were convicted of fraud in the offer and sale of securities, 15 U.S.C. §§ 77q, 77x, and of failing to deposit proceeds

from an "all or none" offering promptly in an escrow account, 15 U.S.C. §§ 78o(c)(2), 78ff; 17 C.F.R. § 240.15c2-4(b).[1] Koss was also found guilty of submitting false documents to the Securities and Exchange Commission (SEC) in the course of its investigation. 18 U.S.C. § 1001.[2]

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1 Rule 15c2-4(b) provides:

> It shall constitute a "fraudulent, deceptive or manipulative act or practice" as used in section 15(c)(2) of the Act, for any broker or dealer participating in any distribution of securities, other than a firm-commitment underwriting, to accept any part of the sale price of any security being distributed unless:
>
> • • • • •
>
> (b) If the distribution is being made on an "all-or-none" basis, or on any other basis which contemplates that payment is not to be made to the person on whose behalf the distribution is being made until some further event or contingency occurs, (1) the money or other consideration received is promptly deposited in a separate bank account, as agent or trustee for the persons who have the beneficial interests therein, until the appropriate event or contingency has occurred, and then the funds are promptly transmitted or returned to the persons entitled thereto, or (2) all such funds are promptly transmitted to a bank which has agreed in writing to hold all such funds in escrow for the persons who have the beneficial interests therein and to transmit or return such funds directly to the persons entitled thereto when the appropriate event or contingency has occurred.
>
> 17 C.F.R. 240.15c2-4(b).

2 Koss was sentenced to imprisonment for one year for conspiracy. Imposition of sentence on the other counts was suspended, and Koss was placed on probation for three years. Koss Securities Corporation was fined $2,500 for conspiracy, with sentencing on the other counts suspended. Layne received a one-year sentence for conspiracy, such sentence to run concurrently with an existing four-year sentence presently being served, but not to begin until December 4, 1974, the date Layne would otherwise be eligible for parole. Sentencing on the other counts was deferred. McGee was sentenced to jail for three months and to two years of probation, with sentencing suspended on the other counts.

Appendix A — Opinion

The indictment, filed on September 25, 1973, named the appellants and twelve others as defendants. In addition it named seven unindicted individuals and corporations as co-conspirators, including Michael Hellerman, the principal government witness, and Murray Levine, who also testified for the government. Nine of the defendants pleaded guilty before trial: of them Stephan Zardus, Robert Santis, Steven Adlman, and Robert Kolbert testified for the government. Of the three remaining defendants, besides appellants, the jury acquitted Stephen Hagler, and the court granted a severance to Samuel Weisman and Harold Lassoff.

Appellants raise numerous issues in challenging their convictions.[3] We find the various claims to be without merit, and we affirm the judgments of conviction.

I.

Appellants Koss and Koss Securities Corporation challenge the sufficiency of the evidence. We find that the record viewed, as it must be, in the light most favorable to the government, *United States* v. *Glasser*, 315 U.S. 60, 80 (1942); *United States* v. *Arroyo*, 494 F.2d 1316 (2d Cir. 1974); *United States* v. *McCarthy*, 473 F.2d 300, 302 (2d Cir. 1972), amply supports the jury's verdict.

In late 1970 Koss and Koss Securities made an agreement with Robert Santis, the president and owner of AIS, to undertake the public offering of 65,000 shares of AIS common stock at one dollar per share. Koss was to receive fifteen percent of the proceeds, ten percent as commission and five percent for expenses. Santis was trying to raise capital for his small, computer consulting company which had just earned a small profit in its second

3 By order of this court, appellant McGee has been permitted to adopt the briefs and oral arguments of his co-defendants on this appeal. He has filed no briefs on his own, nor did he have his own counsel appear at oral argument.

year of operation. The underwriting was on an "all or none" basis: the moneys would be returned to subscribers and no commission paid to Koss unless all the shares were sold by a certain date. All of the proceeds Koss received from the sale of shares were to be deposited promptly in an escrow account pending completion of the offering, as required by SEC rule 15c2-4 and as indicated in the offering circular.

The offering circular became effective on December 2, 1970. During December Koss was unable to sell more than 15,000 shares. He began to receive payments in December, but did not open an escrow account until December 30, 1970, when he deposited $3000--comprised not of customers' checks for AIS shares, but $2875 from Koss Securities' own account at Shearson, Hammill, another brokerage firm, and $125 from the firm's own bank account. Although it was not clear when Koss received all the proceeds from the sale of the 15,000 shares, since some customers may have delayed payment until near the expiration date of the offer on March 2, 1971, Koss continued to receive payments in January and February. However, after the December 30 deposit, no deposit was made to the escrow account until March 5, 1971, several days after the offering was completed.

On February 1, 1971, Interstate Equity Corporation, headed by Stephan Zardus, was added as a co-underwriter and the offering circular correspondingly amended. Zardus, however, was able to place less than 4000 additional shares.

At that point Murray Levine, who had recently been an employee of Koss Securities and knew of Koss' difficulties in disposing of the stock, contacted Michael Hellerman and Murray Taylor, who agreed to sell the remaining 45,600 shares on two conditions: that they receive one-half of the proceeds of the offering, and that they be given complete

control over all 65,000 shares so that the market could be manipulated. This required Levine to convince Koss to recommend to his customers that they sell their AIS stock to Hellerman soon after the offering was completed. Hellerman told Levine that he would pay $1.50 for those shares at that time—a profit of fifty cents per share for Koss' customers.

Levine and Koss thereafter both told Santis that a group had been found to complete the offering. At a mid-February meeting with Levine, Taylor and Hellerman, Santis reluctantly agreed to the kickback arrangement, fearing that without the assistance of Taylor and Hellerman the offering would fail and AIS would receive no new capital. Santis and Levine also gave the required assurances that Koss would turn over the 15,000 shares at $1.50 per share.

Koss' involvement at that point was somewhat unclear. His later statement to Hellerman that he wanted to "renegotiate" suggests that he did promise Levine before this February meeting that he would turn over the shares at $1.50 per share to the new group. In any event, Koss, if not already, was soon well aware that the group completing the offering was involved in some kind of fraud. After Santis' first meeting with Hellerman, Santis called Koss several times to say that the group wanted the shares. Koss replied that he would not turn over control of the shares until he knew exactly what the deal was, who was involved, and what his participation would be.

Meanwhile Hellerman formed a partnership for the AIS promotion with Taylor and appellant Layne. By February 26, four days before the offering would have expired, the group had sold the remaining 45,600 shares. They purchased 27,600 of the shares themselves in the names of acquaintances and names taken from the telephone book. The cost of the purchases would be more than offset by the kickbacks they were to receive. On February 26, Heller-

man and Taylor met with Santis and Zardus and gave them the names of most of the purchasers they had "found," as well as the payment for all the shares. Zardus was to send confirmations only to the legitimate purchasers.

Immediately after that meeting, Zardus called Koss and told him that the offering was going to be successful because of the involvement of Hellerman and Taylor. Zardus also stated that he was accepting a reduced commission because Santis had agreed to kick back one-half of the proceeds of the offering to Hellerman and Taylor. Koss now knew, before the offering was completed and any shares had been issued, not only that the group Levine had found planned to manipulate the post-offering market in the stock, but that AIS would receive substantially less capital than the offering circular indicated.

Koss went along with the Hellerman group and did nothing to have the offering circular amended in spite of his affirmative duties as an underwriter to the investing public. Instead he jockeyed to gain a share of the profits from the manipulation. When the offering was completed he delayed paying AIS the proceeds from the 15,000 shares that he had sold, and he still resisted turning over control of the 15,000 shares to the group. He continued to ask Santis what the deal was and what his participation would be. Finally, on March 5, he wired $9,800 from his firm's bank account to the escrow account, and on March 10 paid AIS $12,500 from the escrow account. That amount represented the proceeds from the 15,000 shares, less Koss' commission and expense allowance of fifteen percent. The balance of the proceeds from the sale of AIS stock was never deposited to the escrow account.

Santis kicked back to the Hellerman group $31,000 and also gave them a $10,000 "loan" to finance the early stages of the manipulation. Zardus received a $1500 commission.

In the end AIS received no more than $20,000 from the offering, although the offering circular had represented the net proceeds as approximately $55,000.

The post-offering efforts to get control of the shares of Koss' customers and to drive the price up began in April. Zardus was told by Hellerman that Koss would be calling him to sell AIS shares, and Koss did call shortly thereafter to sell 2,000 shares at $1-5/16. But Koss also made sales to other brokers, which interfered with Hellerman's plans, and this precipitated a confrontation with Hellerman in Miami on April 12. Hellerman accused Koss of violating his agreement with Levine; Koss said he wanted to "renegotiate." He said he knew that there was going to be a big "jiggle" in the stock and he insisted upon keeping some AIS shares, rather than turning them all over at $1.50 per share. An agreement was reached that Koss could retain 5,000 shares, to be sold later at higher prices but only in proportion to the Hellerman group's sale of its shares. Control over the remainder of the 15,000 shares not already sold to other brokers would be turned over to Hellerman at $1.50 per share.

After this meeting Taylor called Zardus and said Koss would be calling to sell shares at around $1.50, which Koss did (3000 shares). Meanwhile Koss Securities purchased at least 2,800 shares for its own account from its own customers, also at $1.50 per share. It recommended sales by its customers even though the firm planned to purchase and hold up to 5,000 shares to take advantage of expected higher prices. Moreover, during this period, Zardus' firm was selling AIS to brokers and customers at prices from $2 to $4 per share.

Koss, who was now in frequent contact with Hellerman, soon complained that Hellerman was not allowing him to sell his shares fast enough, and threatened to "bang the market" (sell all his shares on the open market, thereby

lowering the price). Hellerman told Koss to open two accounts and sell 2,500 shares into them immediately. Before payment was made, they had a second confrontation on April 22, partially in the presence of Santis and Zardus. Koss repeated his threats to sell unless he was given a bigger piece of the deal and finally Hellerman agreed to pay Koss $2.50 per share for all Koss' stock, including the 2,500 shares Koss had sold into the two accounts. Layne went to Koss Securities where he picked up 5,000 shares; Hellerman paid Koss $7,500 in installments, but finally refused to pay the last $5,000 in July.

Koss also performed numerous incidental services for which he was paid. By May 6, Hellerman, Taylor and Layne had sold 21,400 shares (all of which they had purchased in telephone-book names), at artificially high prices of $2 to $5⅛ per share. In order to transfer these certificates to unsuspecting purchasers and to negotiate checks payable to telephone-book "sellers," Hellerman, Taylor, and Layne forged numerous signatures, paid premiums for the cashing of checks with forged endorsements, and secured signature guarantees from brokerage firms for certificates in telephone-book names. Koss was paid one percent of the proceeds of three checks payable to such names and endorsed by Koss Securities, which were cashed at the firm's bank. Koss also bribed an employee of a member of the New York Stock Exchange to affix signature guarantees to certificates made out to telephone-book names. Koss Securities itself guaranteed many such certificates, even though its normal practice was only to guarantee signatures of persons it knew, or its customers.

By late May, the Hellerman group was concerned with unloading its remaining shares at any price. At the suggestion of Robert Kolbert, who was being paid for finding purchasers for the group's stock, appellant William McGee

agreed to recommend purchases of AIS to Executive Park Securities, a brokerage firm where he had an account and knew the principal brokers, in return for being paid $100 for every 100 shares Executive Park purchased. This kickback arrangement was not disclosed to Executive Park which purchased over 1,500 shares upon the recommendations of McGee and Kolbert. Hellerman paid $1,500 in two installments to Kolbert, who relayed the funds to McGee.

In June the SEC commenced an investigation, and Koss testified before the Commission on June 15. Also in June, Hellerman and Taylor independently went to the United States Attorney to save themselves by telling much of what they knew. The stock sold for $4⅝ per share on June 21, but a week later it had fallen to twenty-five cents per share.

Koss did not testify at trial. Instead, his wife, who was a partner in Koss Securities, testified regarding the business practices of the firm and her husband's relationship with Murray Levine. Koss also offered character witnesses, plus one witness who had ignored his recommendation to sell AIS. Koss' defense was that he had no knowledge of the fraud, especially before the offering was completed, and that he did not enter into any agreements with Hellerman to raise the price of AIS shares.[4]

Layne did not testify, nor did he call any witnesses. McGee, however, did testify. He admitted recommending AIS shares to Executive Park, although he had denied this when testifying before the grand jury. But he denied receiving $1,500 from Kolbert.

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4 Koss attempted to impugn Hellerman's credibility by relying on selected business records of the firm to show, for example, that it did not have 5,000 shares in the period when Hellerman said Layne had picked up 5,000 shares at Koss Securities.

II.

The government's evidence, as outlined above, was clearly sufficient to support the jury's verdict that Koss and Koss Securities were members of a conspiracy to defraud investors by diverting proceeds of a public offering from AIS, and by driving up the price of AIS shares in the post-offering market and selling the group's own shares to unsuspecting investors at artificially high prices.

Koss knew of the fraud before the offering was completed. His main concern was using his control over the shares he had sold as leverage to secure for himself a substantial share of the profits of the manipulation. His immediate stake in the conspiracy was the receipt of his $2,500 commission for the sale of 15,000 shares, which he otherwise would have lost. Thereafter he was in fact successful in increasing his share of the profits of the manipulation by threatening to sell the 15,000 shares on the open market rather than putting them under Hellerman's control.

Koss acted in furtherance of the conspiracy during the offering by violating his duty as an underwriter to disclose material information through an amended offering circular. Thereafter, he helped Hellerman gain control over the 15,000 shares he had sold, going so far as to buy AIS from his own customers at below the market price. He also bought shares for his firm, at the same time he was recommending sales to his customers.

The evidence also supports the jury's verdict that Koss failed to deposit the proceeds of the underwriting promptly in an escrow account as required by SEC rule 15c2-4. Koss sold 15,000 shares, at one dollar per share, in December, after the offering began on December 2. He did not open an escrow account until December 30, when he deposited $3,000 not directly derived from customers' payments for AIS shares. The government then showed that Koss re-

ceived two checks in January, and an additional payment in February, and that no deposit was made to the account after December 30 until March 5, 1971, after the offering had been completed. Even then only the net proceeds due AIS from Koss were deposited.

The jury justifiably did not credit Koss' argument that there was no proof that he received more than $3,000 before the very end of the offering in early March. The greatest difficulty with that explanation was that the December deposit would have had to have been in part an advance deposit intended to cover the payments which the government proved Koss received in January and February. However, such an advance deposit would have served no purpose other than to tie up the firm's own funds unnecessarily. Moreover, such an advance deposit seems markedly inconsistent with Koss' attitude toward the account. Koss told Zardus in February not to deposit in escrow a check Interstate had received from an AIS purchaser, because the offering might not be successful. Koss also never deposited a single customer's check to the account, even though there was no reason not to deposit directly checks which were solely in payment for AIS shares. Finally, the jury could have concluded that one reason Koss delayed paying AIS the net proceeds from the 15,000 shares was that the money had been commingled with the firm's own funds and used in its business.

The conviction for submitting false documents to the SEC on June 15, 1971, is supported by the record. The "blue questionnaire" submitted by Koss, which he said represented all the trades of the firm and its customers in AIS, indicated sales to Zardus' firm of only 4,400 shares between April 7 and April 14, 1971, when the evidence at trial was that 5,000 shares had been sold by Koss and Koss customers to that firm. Furthermore, Koss sub-

mitted a document which he said contained all the trades in AIS which Koss Securities had made for its own account. Yet Mrs. Koss testified that that document was merely her husband's position sheet and would "mean nothing," to someone looking for all the AIS trades made by the house. The government also showed numerous inconsistencies among Koss' records, especially between those he submitted in June 1971 and those the SEC obtained from the firm in November that year, with regard to trades of AIS shares.

III.

Koss and Layne seek reversal of their convictions on the ground that the government's use of Michael Hellerman as a witness deprived them of due process of law in that his testimony was incredible, that he masterminded the scheme while under contract with the government, and that the government improperly rehabilitated him as a witness. We find no error in the use of Hellerman as a witness.

The jury was fully advised regarding Hellerman's relations with the United States Attorney's Office and the crimes he committed before and after he first cooperated with that office regarding his stock-swindling activities. That being so, it was for the jury to decide to what extent, if any, his testimony could be believed. *Hoffa* v. *United States*, 385 U.S. 293, 310-12 (1966); *United States* v. *Aviles*, 274 F.2d 179, 190 (2d Cir.), *cert. denied*, 362 U.S. 974 (1960); *United States* v. *Reina*, 242 F.2d 302, 307 (2d Cir.), *cert. denied*, 354 U.S. 913 (1957). Judge Metzner in his charge fully and fairly cautioned the jury regarding the care it should exercise in evaluating the testimony of an accomplice.

Defense counsel at trial questioned Hellerman intensively and revealed him to be an untiring securities con-

artist who, after being barred from the securities industry by the SEC in the early 1960's, reentered it using the brokerage firm Kelsey & Co. as a front, and became a principal participant in at least seven frauds involving the stock of the following corporations: Imperial Investment Corporation, Belmont Franchising, Inc., At Your Service Leasing, Minute Approved Credit, Globus, Computer Microdata, and finally AIS. As an example of Hellerman's skill, he caused the stock in Imperial Investment Corporation, a worthless or "shell" corporation, to go from $1 to $25 per share. Hellerman reported income from these swindles of over one million dollars between 1969 and 1972. He also induced persons on at least two occasions to give false information to the SEC, and he admitted having lied, cheated and bribed continually in the course of his numerous swindles.

Hellerman stated that in November, 1970, he entered into an agreement with the United States Attorney's Office in New York, pursuant to which he agreed to plead guilty to one count of fraud in connection with the Imperial Investment promotion, to give information to the government and to commit no further crimes, in return for nonprosecution for other crimes he had committed. He admitted at trial that he had broken that agreement by subsequently participating in the Computer Microdata and AIS frauds. Furthermore Hellerman admitted lying to the United States Attorney in June 1971 about his own participation in the AIS scheme, in an attempt to place the blame on Taylor. At that time he was instructed to stay out of the deal but to report developments.

Finally, the defense questioned Hellerman about his new agreement with the government, made when his breach of the prior agreement had been discovered. Hellerman had pleaded guilty to two additional counts of fraud and served

a total of only nine and one-half months in jail.[5] He also had agreed to testify for the government, in return for non-prosecution for all his other crimes, so long as he testified truthfully.

Appellants do not now come forward with any additional information of perjury or other crimes committed by Hellerman of which the jury was not advised. Thus their reliance on *Mesarosh* v. *United States*, 352 U.S. 1 (1952) is misplaced. In that case the Supreme Court reversed a conviction and ordered a new trial when it was discovered after trial, and called to the court's attention by the Solicitor General, that the principal government witness had made numerous untrue statements on related matters in other relatively contemporaneous proceedings. Here, however, the jury had before it a full catalogue of Hellerman's misdeeds, double dealings and prevarications.

The government must take its witnesses where it can find them. Few are the fraud cases where the government can prove its charges without calling witnesses like Hellerman who have participated actively in the scheme and profited from the fraud.

It is for the prosecution to make the decision as to who shall be the witness and who the accused. While one cannot help but wonder how much value the government received from the bargain from which Hellerman benefited, the

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5 Hellerman was sentenced to two years imprisonment for his three guilty pleas in relation to the Imperial Investment, Belmont Franchising, and At Your Service Leasing promotions. However, his sentence was reduced, without a recommendation from the United States Attorney, to time served (nine and one-half months) in September 1973, presumably because of his cooperation with the government in other trials.

As part of this agreement Hellerman also agreed to make restitution of $100,000 to defrauded investors. At the time of trial, he had repaid $12,000.

court must leave such decisions to the Department of Justice and leave to the jurors the assessment of the testimony.[6]

From the record before us we can only conclude that the government had no responsibility for Hellerman's part in the AIS stock promotion in the spring of 1971 and that the United States Attorney's Office knew nothing about it until Hellerman, in light of the anticipated collapse of the market in the stock, went to the United States Attorney and told him of the scheme while attempting to play down his own part in it. At no time did the government condone Hellerman's illegal activities or encourage him to participate in any questionable conduct. The fact that Hellerman failed to keep his word to stay out of stock swindles was relevant only to the jury's assessment of his credibility. It is also clear that Hellerman entered into the AIS scheme on his own and not with the intention of securing information for the government. Instead he went to the government only later when it served his purpose to do so.

The Hellerman situation parallels that in *United States* v. *Corallo*, 413 F.2d 1306, 1320-21 (2d Cir.), *cert. denied*, 396 U.S. 958 (1969), where a government informant on other matters entered a particular conspiracy solely on his own and with no intention of securing information for the government. That person's involvement with the government on other matters was found not to make him a government agent for purposes of that particular case. Similarly, as Hellerman was wholeheartedly a member of this conspiracy, his conduct cannot form the basis of an entrap-

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6 It should be noted that Hellerman has testified for the government in six or seven stock fraud cases since entering into his second agreement with the government, including one case, involving Belmont Franchising, recently passed upon by this court. See *United States* v. *Dioguardi*, 492 F.2d 70 (2d Cir. 1974), *cert. denied*, 43 U.S.L.W. 3212 (U.S. Oct. 15, 1974) (No. 73-1621).

ment or due process claim when he later agrees to testify for the government.[7]

We find nothing in this record which persuades us that there could have been a miscarriage of justice because of the role which Hellerman played as a witness. It was as a witness, and only as a witness, that the government used him.

In any event, we note that the participation of the appellants in the AIS manipulation was so abundantly proven by other evidence which corroborated in essential details almost all of Hellerman's testimony that it is difficult to see how the jury could have done otherwise than convict them.

With respect to the rehabilitation of Hellerman by the government on re-direct examination, it was not error for the trial court to allow the government to introduce the text of Hellerman's agreement with the government.[8] On cross-examination defense counsel had tried to establish that Hellerman had a motive to testify falsely because of his desire to avoid prosecution for the numerous offenses which he at trial admitted having committed. Introduction of the agreement showed that Hellerman in fact was liable to prosecution for all such crimes if he committed perjury while testifying for the government. It was thus properly admitted as completion of an area only partially explored on cross-examination.

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7 Even if Hellerman had been working for the government, Koss would have no viable entrapment claim since the evidence of his predisposition was overwhelming. Entrapment, in any event, is a jury question, *United States* v. *Russell,* 411 U.S. 423 (1972), yet Koss' counsel did not request that the issue be submitted to the jury.

8 All references to organized crime and to threats on Hellerman's life on account of his testimony were deleted from the agreement before it was introduced into evidence.

IV.

Nor is there any merit to Koss' remaining claims. First, he argues that he was denied his sixth amendment right to be informed of the charges against him. We find, however, that he has failed to demonstrate that the indictment was insufficient, or that the trial judge abused his broad discretion in denying portions of his bill of particulars. *E.g., United States* v. *Salazar,* 485 F.2d 1272, 1277-78 (2d Cir. 1973), *cert. denied,* 415 U.S. 985 (1974). Koss complains that he was prejudiced as a result of the trial court's order because he did not know before trial that the following would be proved against him: the guaranteeing of forged signatures on stock certificates, knowledge of the kickback from Santis to Hellerman, cashing a forged check for Hellerman, and selling 10,000 shares to Hellerman at around $1.50 per share. However, we find no abuse of discretion, since Koss was informed, among other things, that he was charged with having joined, in January or February of 1971, a conspiracy of named persons to commit fraud in the offer and sale of AIS securities and to manipulate the post-offering market; that pursuant to this conspiracy Hellerman and Santis worked out a fifty-percent kickback arrangement in the offering; that Koss Securities' transactions in AIS as both principal and agent in the first half of 1971 were part of that manipulation; that he bought stock from his customers below market price; and that numerous checks and stock powers were forged by certain named conspirators and other in the process of carrying out the conspiracy.

Koss' claim that he was prejudiced by the trial court's exclusion of certain documentary evidence is also without merit. Near the close of trial, and without laying any foundation, Koss' counsel offered, at one time, all Koss Securities' customer account cards to show that Koss had

not intentionally submitted false documents to the SEC. The trial judge was acting within his discretion to exclude that evidence when defense counsel did not identify even a single entry which supported the defense. Similarly, cancelled checks payable to customers who sold any stock in their accounts in the summer of 1971 were properly excluded when no attempt was made further to identify what the payments were for.

V.

Appellant Layne contends that the trial court's charge to the jury,[9] although not objected to at trial, constitutes

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9 To prove a conspiracy here the evidence must show beyond a reasonable doubt the existence of each one of the following material elements:

* * * * *

Second, that it was part of the conspiracy to do any one of the following:

(1) that the defendants and co-conspirators unlawfully, wilfully and knowingly, in the offer to sell and sale of securities, . . . by the use of the mails, would violate Section 17(a), . . .

(2) that the defendants and co-conspirators in connection with the purchase and sale of securities, . . . [would use] the mails, to use and employ manipulative and deceptive practices and contrivances in contravention of Rule 10b-5 . . .

(3) that the defendants and co-conspirators, having devised . . . a scheme and artifice to defraud, . . . would cause to be delivered by mail, . . . certain matter to be sent and delivered by the Post Office Department . . . .

* * * * *

You may find that a defendant acted knowingly and wilfully if he acted voluntarily and purposely and with specific intent to do something which the law forbids . . . .

* * * * *

It is not required that each of the conspirators participate in or have knowledge of all of the conspiracy's operations. The guilt of a conspirator is not governed by the extent of his participation. He need not know of all the alleged conspirators.

plain error because it failed to apprise the jury that specific intent to commit particular acts conferring federal jurisdiction, such as use of the mails, is required to convict a person of conspiracy under 18 U.S.C. § 371. See *United States* v. *Alsondo*, 486 F.2d 1339, 1343 (2d Cir. 1973), *cert. granted sub nom. United States* v. *Feola*, 42 U.S.L.W. 3584 (U.S. Apr. 15, 1974); *United States* v. *Mauro*, slip op. 4451 (2d Cir., June 26, 1974), *petition for cert. filed*, 43 U.S.L.W. 3033 (U.S. July 25, 1974) (No. 74-9); *United States* v. *Crimmins*, 123 F.2d 271 (2d Cir. 1941). We do not agree.

Layne complains principally of that portion of the charge which states that to be a member of the conspiracy one need not have full knowledge of its operations, as long as one becomes a member "with full knowledge of its general scope and purposes." We do not read that section as negating Judge Metzner's earlier instruction that the conspiracy must be one to use the mails (or instrumentalities of interstate commerce) in committing the particular fraud charged.[10] Indeed, use of such means seems to be included within the "general scope and purposes" of the conspiracy referred to by the trial judge in the very passage relied upon by Layne.[11]

Even if a defendant participated in the conspiracy to a degree less than that of his fellow conspirators or in a relatively subordinate or minor way, he is equally culpable, as long as he became a member of the conspiracy with knowledge of its general scope and purposes.

10 It should be noted that Layne's counsel did not object to this aspect of the charge, and did not call to the trial court's attention any ambiguity which he found in the charge as given.

11 In light of our conclusion, we need not consider the government's argument that 18 U.S.C. § 371 does not in fact require that conspirators intend to commit that act, such as use of the mails, which in fact establishes federal jurisdiction over the substantive crime

Layne's claim that his conviction should be reversed because of the prejudice accruing from his joint trial with Koss is also without merit. The evidence as to his role in the conspiracy was not so disproportionate in relation to that against Koss and Koss Securities that a severance was required. See *United States* v. *Capra*, 501 F.2d 267, 281 (2d Cir. 1974); *United States* v. *Rizzo*, 491 F.2d 215, 218 (2d Cir.), *cert. denied*, 416 U.S. 990 (1974). Moreover, although the trial judge permitted the government to prosecute Koss at the joint trial for submitting false documents to the SEC, after initially severing that count, evidence of Koss' knowing submission of false documents would nevertheless have been admissible to show Koss' consciousness of guilt in regard to the other counts charged. *E.g.*, *United States* v. *Tropiano*, 418 F.2d 1069, 1080-81 (2d Cir. 1969), *cert. denied*, 397 U.S. 1021 (1970).

We have considered the other issues raised by the appellants and find them to be without merit.

The judgments of conviction entered below are affirmed.

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involved. See *United States* v. *Alsondo*, 486 F.2d 1339, 1343 (2d Cir. 1973), *cert. granted sub nom. United States* v. *Feola*, 416 U.S. 935 (1974); *United States* v. *Mauro*, slip op. 4451 (2d Cir. June 26, 1974), *petition for cert. filed*, 43 U.S.L.W. 3033 (U.S. July 25, 1974) (No. 74-9).

APPENDIX B — ORDER OF THE UNITED STATES COURT OF APPEALS DATED DECEMBER 18, 1974

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the eighteenth day of December, one thousand nine hundred and seventy-four.

Present:

HON. J. EDWARD LUMBARD

HON. WILFRED FEINBERG

HON. JAMES L. OAKES

Circuit Judges.

74-1878

United States of America,

Plaintiff-Appellee,

v.

Appendix B — Order

Theodore Koss, Koss Securities Corporation, Stephen Zardus, Robert Santis, Herbert Schulman, Steven Adlman, Robert Kolbert, Stanley Schwartz, Samuel Weisman, Harold Lassoff, Martin Roth, Erwin Layne, Irwin Hyman, William McGee, Stephen Hagler, Dan Anfang,

Defendants,

Theodore Koss, Koss Securities Corporation, Erwin Layne, William McGee,

Defendants-Appellants.

A petition for a rehearing having been filed herein by counsel for the

Upon consideration thereof, it is

Ordered that said petition be and hereby is DENIED.

s/ A. Daniel Fusaro
A. DANIEL FUSARO
Clerk

APPENDIX C - STATUTES

18 U.S.C. §2

§ 2. Principals

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

June 25, 1948, c. 645, 62 Stat. 684; Oct 31, 1951, c. 655, § 17b, 65 Stat. 717.

18 U.S.C. §371

§ 371. Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons .o any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor. June 25, 1948, c. 645, 62 Stat. 701.

18 U.S.C. §1001

§ 1001. Statements or entries generally

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the

same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both. June 25, 1948, c. 645, 62 Stat. 749.

18 U.S.C. §1341

§ 1341. Frauds and swindles

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both. June 25, 1948, c. 645, 62 Stat. 763; May 24, 1949, c. 139, § 34, 63 Stat. 94.

15 U.S.C. §77q

§ 77q. Fraudulent interstate transactions

(a) It shall be unlawful for any person in the offer or sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly—

(1) to employ any device, scheme, or artifice to defraud, or

(2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact

necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

(b) It shall be unlawful for any person, by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, to publish, give publicity to, or circulate any notice, circular, advertisement, newspaper, article, letter, investment service, or communication which, though not purporting to offer a security for sale, describes such security for a consideration received or to be received, directly or indirectly, from an issuer, underwriter, or dealer, without fully disclosing the receipt, whether past or prospective, of such consideration and the amount thereof.

(c) The exemptions provided in section 77c of this title shall not apply to the provisions of this section.

May 27, 1933, c. 38, Title I, § 17, 48 Stat. 84; Aug. 10, 1954, c. 667, Title I, § 10, 68 Stat. 686.

15 U.S.C. §77x

§ 77x. Penalties

Any person who willfully violates any of the provisions of this subchapter, or the rules and regulations promulgated by the Commission under authority thereof, or any person who willfully, in a registration statement filed under this subchapter, makes any untrue statement of a material fact or omits to state any material fact required to be stated therein or necessary to make the statements therein not misleading, shall upon conviction be fined not more than $5,000 or imprisoned not more than five years, or both.

May 27, 1933, c. 38, Title I, § 24, 48 Stat. 87.

Appendix C — Statutes

15 U.S.C. §78j

§ 78j. Manipulative and deceptive devices

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—

(a) To effect a short sale, or to use or employ any stop-loss order in connection with the purchase or sale, of any security registered on a national securities exchange, in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

June 6, 1934, c. 404, § 10, 48 Stat. 891.

15 U.S.C. §78o(2)

(2) No broker or dealer shall make use of the mails or of any means or instrumentality of interstate commerce to effect any transaction in, or to induce or attempt to induce the purchase or sale of, any security (other than an exempted security or commercial paper, bankers' acceptances, or commercial bills) otherwise than on a national securities exchange, in connection with which such broker or dealer engages in any fraudulent, deceptive, or manipulative act or practice, or makes any fictitious quotation. The Commission shall, for the purposes of this paragraph, by rules and regulations define, and prescribe means reasonably designed to prevent, such acts and practices as are fraudulent, deceptive, or manipulative and such quotations as are fictitious.

Appendix C — Statutes

15 U.S.C. §78ff

§ 78ff. Penalties

(a) Any person who willfully violates any provision of this chapter, or any rule or regulation thereunder the violation of which is made unlawful or the observance of which is required under the terms of this chapter, or any person who willfully and knowingly makes, or causes to be made, any statement in any application, report, or document required to be filed under this chapter or any rule or regulation thereunder or any undertaking contained in a registration statement as provided in subsection (d) of section 78*o* of this title, which statement was false or misleading with respect to any material fact, shall upon conviction be fined not more than $10,000, or imprisoned not more than two years, or both, except that when such person is an exchange, a fine not exceeding $500,000 may be imposed; but no person shall be subject to imprisonment under this section for the violation of any rule or regulation if he proves that he had no knowledge of such rule or regulation.

(b) Any issuer which fails to file information, documents, or reports required to be filed under subsection (d) of section 78*o* of this title or any rule or regulation thereunder shall forfeit to the United States the sum of $100 for each and every day such failure to file shall continue. Such forfeiture, which shall be in lieu of any criminal penalty for such failure to file which might be deemed to arise under subsection (a) of this section, shall be payable into the Treasury of the United States and shall be recoverable in a civil suit in the name of the United States.

(c) The provisions of this section shall not apply in the case of any violation of any rule or regulation prescribed pursuant to paragraph (3) of subsection (c) of section 78*o* of this title, except a violation which consists of making, or causing to be made, any statement in any report or document required to be filed under any such rule or regulation, which statement was at the time and in the light of the circumstances under which it was made false or misleading with respect to any material fact.

June 6, 1934, c. 404, § 32, 48 Stat. 904; May 27, 1936, c. 462, § 9, 49 Stat. 1380; June 25, 1938, c. 677, § 4, 52 Stat. 1076; Aug. 20, 1964, Pub.L. 88–467, § 11, 78 Stat. 580.